

April 26 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 09-0501

THE STATE OF MONTANA,
Plaintiff/Respondent,
v.
KEVIN LEE CHRISTIANSEN,
Defendant/Appellant.

**APPELLANT'S OPENING
BRIEF**

ON APPEAL FROM THE MONTANA TWELFTH JUDICIAL
DISTRICT COURT, HILL COUNTY,
BEFORE THE HONORABLE JOHN C. MCKEON

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MONTANA CRIMINAL JURY INSTRUCTIONS

MCJI 10-20112

1 **ISSUE PRESENTED**

2 Did the District Court err when it failed to
3 instruct the jury on the correct definition
4 of "actual physical control," set forth in
5 the pattern jury instructions and which it
6 provided at the earlier trial of this matter?

7
8 **STATEMENT OF THE CASE**

9 Mr. Christiansen, a hotel maintenance manager, was
10 charged with fourth offense driving under the influence
11 of alcohol (DUI) on May 5, 2008.

12 On December 17, 2008, the charge was amended to
13 include language accusing Mr. Christiansen of being in
14 actual physical control of a motor vehicle while under
15 the influence of alcohol.

16 On December 18, 2008, through December 19, 2008,
17 the first trial of this matter was conducted. This
18 trial resulted in a hung jury.

19 On June 4, 2009, through June 5, 2009, the second
20 trial of this matter was conducted. This trial, after
21 numerous jury questions on the instruction given of the
22 definition of "actual physical control," resulted in
23 Mr. Christiansen's conviction on the offense of DUI for
24 being in "actual physical control" of a motor vehicle
25 while under the influence of alcohol.

26 On September 3, 2009, Mr. Christiansen was
27 sentenced for this felony conviction. (DC docket no.
28 135, Appendix **A**).

1 Because Mr. Christiansen had been a law abiding
2 citizen, with no violations of his conditions of
3 release, during the lengthy pendency of proceedings,
4 his sentence was stayed pending appeal.

5 Mr. Christiansen continues to remain out of jail,
6 working, and is in full compliance with the law and the
7 Court system.

8 SUMMARY OF ARGUMENT

9 The District Court erroneously instructed the jury,
10 which prejudicially affected Mr. Christiansen's rights.

11 The District Court's instruction on the definition
12 of "actual physical control" was confusing.

13 The District Court's instruction on the definition
14 of "actual physical control" was contrary to the
15 pattern jury instruction and to the law as pronounced
16 by this Court.

17 The District Court's instruction on the definition
18 of "actual physical control" provided at the first
19 trial, and requested by the State at the first trial,
20 was the law of the case, which mandated its reading at
21 the re-trial.

22 STATEMENT OF FACTS

23 On May 3, 2008, Mr. Christiansen was arrested for
24 suspicion of driving or being in physical control of a
25 motor vehicle while under the influence of alcohol.

26 According to testimony of the investigation law
27 enforcement official, Hill County Deputy Sheriff Jason
28

1 Geer (Geer herein), at approximately 3:00 a.m., he
2 received a report of a person sleeping in a vehicle in
3 the parking lot of a Havre, Montana bar. (6/4/09 Tr.
4 pg. 159, lns. 4-7).

5 When Geer responded, he observed a brown pickup
6 running with the break lights activated. (12/18/08 Tr.
7 pg. 168, lns. 10-11 & 6/4/09 Tr. pg. 160, lns. 1-3).

8 When he got closer to the pickup, Geer saw a male,
9 later identified as Mr. Christiansen, sleeping behind
10 the wheel of the motor vehicle. (12/18/08 Tr. pg. 168,
11 lns. 21-23 & 6/4/09 Tr. pg. 160, lns. 10-12).

12 Geer approached the motor vehicle, and opened the
13 door to turn the vehicle off. (12/18/08 Tr. pg. 169,
14 lns. 14-15 & 6/4/09 Tr. pg. 161. lns. 13-15).

15 Because Mr. Christiansen didn't wake up when Geer
16 entered his truck, Geer tried to wake Mr. Christiansen
17 up by pinching him. (12/18/08 Tr. pg. 160, lns. 1-9 &
18 6/4/09 Tr. pg. 162, lns. 19-23).

19 Geer had to pinch Mr. Christiansen three (3) to
20 four (4) times in order to wake him up. (12/18/08 Tr.
21 pg. 192, lns. 5-7 & 6/4/09 Tr. pg. 185. lns. 12-14).

22 The vehicle was not moving and Geer didn't know
23 what gear the vehicle was in because he didn't look.
24 (12/18/08 Tr. pg. 193, lns. 6-13 & 6/4/09 Tr. pg. 190.
25 lns. 4-14).

26 Mr. Christiansen's hands were by his sides as he
27 slept without movement. (12/18/08 Tr. pg. 169, lns.
28

1 12-17 & 6/4/09 Tr. pgs. 189. lns. 12-25 & 190-191, lns
2 21-25 & 1-24).

3 When Mr. Christiansen finally responded he told
4 Geer his name was "Coors" and pointed to the windshield
5 and said, "charge." (12/18/08 Tr. pg. 170, lns. 12-15,
6 17-21 & 6/4/09 Tr. pg. 163. lns. 12-15).

7 When Mr. Christiansen was asked to step out of the
8 vehicle he tried, repeatedly, to unfasten a seatbelt
9 that wasn't latched. (12/18/08 Tr. pg. 171, lns. 16-23
10 & 6/4/09 Tr. pg. 163. lns. 17-22).

11 Mr. Christiansen told Geer he thought he was in
12 front of a hotel, when in fact he was nowhere near a
13 hotel. (12/18/08 Tr. pg. 172, lns. 18-19 & 6/4/09 Tr.
14 pg. 164. lns. 13-15).

15 Mr. Christiansen was unstable when he began to step
16 out of the motor vehicle. He fell into the vehicle for
17 support and would have fallen if the car wasn't there
18 for support. (12/18/08 Tr. pg. 172, lns. 11-14 &
19 6/4/09 Tr. pg. 161. lns. 13-15, pg. 187, lns. 17-20).

20 Geer did not ask Mr. Christiansen to perform any
21 so-called standardized field sobriety tests at the
22 scene due to concern for Mr. Christiansen's safety.
23 (12/18/08 Tr. pg. 173, lns. 5-8 & 6/4/09 Tr. pg. 166,
24 lns. 7-9).

25 And although he asked Mr. Christiansen to perform
26 these tests at the Hill County Detention Center, Geer
27 was required to stop Mr. Christiansen during his
28

1 performance of these tests because he was concerned
2 that Mr. Christiansen would hurt himself. (12/18/08
3 Tr. pg. 179, lns. 1-5 & 6/4/09 Tr. pg. 172. lns. 17-
4 22).

5 There was no way Mr. Christiansen could operate the
6 motor vehicle while in the condition Geer found him in
7 - asleep. (12/18/08 Tr. pg. 198, lns. 14-23 & 6/4/09
8 Tr. pg. 192. lns. 5-15).

9 Mr. Christiansen provided a blood sample which
10 showed that his blood alcohol level was a .26, over
11 three (3) times the legal limit. (12/18/08 Tr. pg.
12 208, lns. 16-21 & 6/4/09 Tr. pg. 204. lns. 14-18).

13 Prior to the December 18, 2008, trial, the State
14 submitted proposed instructions, which included its
15 proposed number five (5). (DC docket no. 56, Appendix
16 C).

17 This instruction sets forth the language of
18 pattern jury instruction 10-201, which, in essence
19 defines actual physical control of a motor vehicle -
20 "the Defendant is in actual physical control of a motor
21 vehicle if the Defendant is not a passenger and is in a
22 position to, and has the ability to, operate the
23 vehicle in question."

24 At the close of evidence the State proposed two (2)
25 additional proposed jury instructions addressing the
26 issue of "physical control of a motor vehicle." (DC
27 docket no. 74).

28

1 State's proposed instruction eleven (11) states:
2 "'Actual physical control' means that a person has
3 existing or present bodily restraint, directing
4 influence, domination or regulation of a vehicle."

5 State's proposed instruction twelve states: "A
6 motorist remains in a position to regulate a vehicle
7 while asleep behind the steering wheel of a vehicle."

8 The District Court rejected both of these
9 instructions, choosing the State's initial instruction
10 on the definition of "actual physical control."

11 In so deciding, the District Court stated:

12 State's Proposed Instructions 11 and
13 12 are refused. The correct statement
14 of the law is represented by State's
Proposed Instruction Number 5.

15 As I see it, it is the application of
16 that law as stated in State's Proposed
Instruction Number 5, that resulted in
17 the statements given in *State v. Hudson*.
That the State makes an effort to
18 develop into proposed instructions.
Of course, it's the application of
19 the law here that counsel will be
20 able to argue in the course of its
closing argument. And it is left
21 to the jury, applying the facts of
this case, to determine how best to
apply the law.
(12/18/08 Tr. pg. 238, lns. 12-23).

22 The pattern jury instruction became the District
23 Court's given instruction six (6). (DC docket no. 76,
24 Appendix **B**).

25 The December 18, 2008, jury presented one (1)
26 question on the definition of "has the ability" in the
27 pattern jury instruction regarding physical control of
28

1 a motor vehicle.

2 Prior to the June 4, 2009, re-trial, the State
3 proposed jury instructions which again included the
4 language set forth in its earlier proposed instructions
5 eleven (11) and twelve (12), as new proposed in
6 instructions five (5) and six (6). (DC docket no. 110,
7 Appendix C).

8 On the morning of the commencement of the re-trial,
9 Mr. Christiansen advised the District Court that his
10 proposed jury instructions would be the instructions
11 the District Court instructed the jury at the earlier
12 trial, as they were the law of the case. (6/4/09 Tr.
13 pg. 6, lns. 15-24).

14 During the settlement of instructions, the District
15 Court rejected the pattern jury instruction previously
16 believed was the appropriate definition of "actual
17 physical control," as well as the State's proposed
18 instruction on actual physical control (the State
19 having withdrawn its proposed instruction six (6)).

20 In so doing the District Court stated:

21 Okay. I realize the defense proposed
22 number is a pattern instruction.
23 However, I find it to be confusing and
24 I believe that to fully and fairly
25 instruct this jury on the law, I'm
26 going to need a different instruction,
27 as it relates to the meaning of the
28 term actual physical control.

29 All the cases cited by the State in its
30 Proposed Instruction No. 5, I must
31 disagree with the statement of defense
32 counsel as to the - - that its decisions
33 and its reliance on the *Taylor* case, I

1 believe that the *Hudson* decision more
2 accurately relies on that 1958 decision
3 of *Ruona*, R-U-O-N-A, which is also cited
4 in State's Proposed Instruction No. 5.

5 I know that *Taylor* is referenced in the
6 Hudson case. And in the Hudson case you
7 will find in Paragraph 13 of the Hudson
8 decision, that the *Robinson* case is cited
9 for the very proposition that is contained
10 in State's proposed, the Instruction No.
11 5.

12 In term that the Robinson decision relies
13 on the *Ruona*, R-U-O-N-A, decision, a
14 1958 decision. After considering all
15 of these cases, I believe the better
16 instruction would be the Defendant is
17 actually in actually physical control
18 of a vehicle, if the Defendant is not
19 a passenger and has an existing or
20 present bodily function that exercises
21 restraint or directs influence,
22 domination or regulation of a motor
23 vehicle. That's the instruction that
24 I will give in lieu of either the
25 Defendant's Proposed 6 or State's
26 Proposed 5. I reject each of those.

27 (6/4/09 Tr. pgs. 227-228, lns. 10-25 &
28 1-19).

17 This instruction was read to the jury as
18 instruction nine (9) - "The Defendant is in actual
19 physical control of a motor vehicle if the Defendant is
20 not a passenger, and has an existing or present bodily
21 function that exercises restraint or directs influence,
22 domination, or regulation of a vehicle." (DC docket
23 no. 115, Appendix D).

24 Unfortunately, during the course of deliberations,
25 the jury issued numerous questions and/or statements
26 regarding this extremely confusing attempt at defining
27 "actual physical control."
28

1 First, the jury posed:

2 Could you please give us a more clear
3 definition of what physical control is?

4 What is the time line we should look at
5 when considering physical control?

6 Second, the jury stated:

7 This is to notify you that the jury is
8 split 6 to 6 and is unable to come to a
9 unanimous decision.

10 Third, the jury stated:

11 We would like a copy of a legal
12 dictionary brought to the Jury Room.

13 Fourth, the jury asked:

14 May we please have the legal definition
15 of domination and regulation?

16 Does 'present' & 'existing' mean at the
17 time of the officer's arrival?

18 Fifth, the jury stated:

19 We were unable to come to a unanimous
20 decision.

21 (DC Docket no. 116, Appendix E).

22 ARGUMENT

23 THE DISTRICT COURT ERRED WHEN IT FAILED
24 TO INSTRUCT THE JURY ON THE CORRECT
25 DEFINITION OF "ACTUAL PHYSICAL CONTROL,"
26 SET FORTH IN THE PATTERN JURY INSTRUCTIONS
27 AND WHICH IT PROVIDED AT THE EARLIER TRIAL
28 OF THIS MATTER.

23 The only purpose of jury instructions is to
24 guarantee decisions consistent with the evidence and
25 the law, which can only be accomplished when the
26 instructions are as plain, clear, concise, and brief as
27 possible. *Busta v. Columbus Hospital* (Mont., 1996),
28

1 916 P.2d 122, 140.

2 In determining if a District Court has properly
3 instructed a jury in a criminal case, the Montana
4 Supreme Court determines whether the instructions,
5 taken as a whole, fully and fairly instruct the jury on
6 the applicable law. *State v. Archambault* (Mont.,
7 2007), 152 P.3d 698.

8 A District Court's decisions pertaining to jury
9 instructions are reviewed for abuse of discretion.
10 *State v. Bieber* (Mont., 2007), 170 P.3d 444.

11 To be deemed reversible error, such error in
12 instructing the jury must prejudicially affect the
13 defendant's substantial rights. *State v. Courville*
14 (Mont., 2002), 61 P.3d 749.

15 Mr. Christiansen's fundamental rights, including
16 due process, a fair trial, and an impartial jury,
17 pursuant to Article II, Sections 17, 24 and 25 of the
18 Montana Constitution and the Fifth and Sixth Amendments
19 to the United States Constitution, were violated when
20 the District Court furnished the jury with a confusing
21 instruction on the definition of "actual physical
22 control."

23 This instruction was contrary to the pattern jury
24 instruction, which was given prior to deliberations in
25 the first trial, and contrary to the law.

26 First, it cannot be refuted that the instruction
27 offered by the District Court was exceedingly
28

1 confusing.

2 Because the instruction was so confusing, the jury
3 was not able to interpret the law - specifically the
4 law on "actual physical control."

5 The District Court's instruction is confusing on
6 its face, as well as in its application, as seen by the
7 jury's remarks:

8 1. Could you please give us a more clear
9 definition of what physical control is?

10 What is the time line we should look at
when considering physical control?

11 2. We would like a copy of a legal
12 dictionary brought to the Jury Room.

13 3. May we please have the legal definition
of domination and regulation?

14 Does 'present' & 'existing' mean at the
15 time of the officer's arrival?

16 (DC Docket no. 116, Appendix E).

17 In this case, the only issue is whether Mr.
18 Christiansen, in his condition, was in physical control
19 of a motor vehicle - as can be seen in both trials, the
20 facts were not in dispute.

21 The only instruction presented to the jury to
22 assist them in determining this issue was the only
23 instruction they were confused on.

24 Second, the proper instruction is the pattern jury
25 instruction defining "actual physical control."

26 Contrary to the District Court's instruction, this
27 instruction is short and concise, and is a correct
28 statement of the law.

1 Clearly, the State and the District Court believed
2 this to be the case at the first trial.

3 Even prior to the Montana Supreme Court approving
4 of the definition set forth in the pattern jury
5 instructions, it stated, in reference to a definition
6 with similarities to that offered by the Court:

7 . . . we note in passing that the
8 language in *Ruona* referred to above,
9 while not objected to by either the
10 defense or the State, is perhaps no the
11 most clear and understandable definition
12 of 'actual physical control.' Given the
13 increasing numbers of DUI trial and
14 felony DUI charges occasioned by the
15 1995 legislative changes to the DUI laws,
16 and in the absence of any statutory
17 definition of 'actual physical control,'
18 It may be appropriate that the Criminal
19 Jury Instruction Commission consider
20 adopting a clearer and more understandable
21 definition of this phrase as part of the
22 model Montana Criminal Jury Instructions.

23 *State v. Robison* (Mont., 1997),
24 931 P.2d 706, 708.

25 Of course the commission followed this suggestion
26 by offering MCJI 10-201 - "The Defendant is in actual
27 physical control of a motor vehicle if the Defendant is
28 not a passenger and is in a position and has the
ability to, operate the vehicle in question."

29 And this Court declared the forementioned
30 definition to be the law when it stated:

31 The District Court correctly instructed
32 the jury regarding Hudson's 'actual
33 physical control' of the vehicle. The
34 court's instruction proves identical to
35 the Model Criminal Jury Instruction
36 produced by the Criminal Jury Instruction
37 Commission and accurately reflects the
38 law as developed by judicial interpretation.

1 *State v. Hudson* (Mont., 2005), 114 P.3d
2 210, 212.

3 Although, this Court's pronouncement in *Hudson*
4 leaves no reasonable view that another definition
5 suffices, even assuming *arguendo*, the *Ruona* definition
6 has vitality, the District Court's definition did not
7 even comport with *Ruona*.

8 While there are some similarities in the District
9 Court's definition and the *Ruona* definition, the
10 District Court's definition differs significantly.

11 The District Court added more terms, thus
12 increasing the confusing nature implicit in the *Ruona*
13 definition, as discussed in *Robison*.

14 And again, there is no mistaking the fact that the
15 jury was exceedingly confused with the entire
16 instruction - all to Mr. Christiansen's detriment.

17 Third, the correct definition of "actual physical
18 control" proposed by the State at the first trial and
19 provided by the District Court at the first trial
20 is the law of the case.

21 As such, the District Court was bound to provide it
22 to the jury at the re-trial.

23 At the first trial, the District Court said that
24 the pattern jury instruction was the correct statement
25 of the law.

26 At the first trial, the State offered this correct
27 statement of the law.
28

1 Shortly before settling of instructions, the State
2 indicated it wished the Court to provide the *Ruona*
3 instruction. However, it never objected to the
4 provision of the pattern jury instruction and never
5 withdrew this instruction.

6 Persuasive authority for this position is set forth
7 by Court in *State v. Crawford* (Mont., 2002), 48 P.3d
8 706, 710. There the Court stated: "when the State
9 fails to properly object to a jury instruction, the
10 instruction, whether it includes an unnecessary element
11 or not, becomes the law of the case once delivered, and
12 the jury is accordingly bound by it." *Id.*

13 Here, not only did the State not properly object,
14 but the State provided the instruction, and the
15 District Court stated it was the correct statement of
16 the law.

17 When it reversed itself, the District Court did not
18 revoke this earlier statement - it simply attempted to
19 alleviate what it perceived as a confusing instruction
20 - and, in the process, irrefutably confused the jury.

21 This incorrect and confusing statement of the law
22 affected Mr. Christiansen's fundamental rights, which
23 he humbly believes must be rectified by a reversal of
24 his conviction.

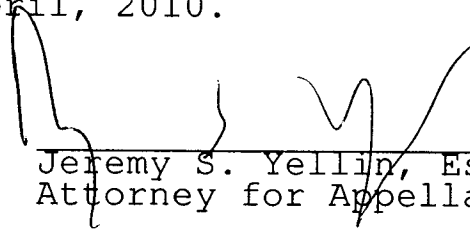
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CONCLUSION

As a result of the erroneous instruction on "actual physical control," Mr. Christiansen was wrongfully convicted of DUI.

This conviction must be reversed.

DATED this 26th day of April, 2010.



Jeremy S. Yellin, Esq.
Attorney for Appellant

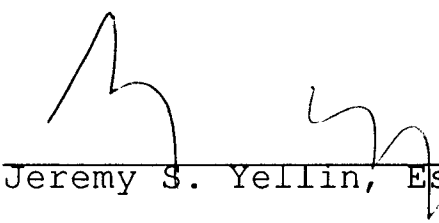
CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2010, I served a copy of the foregoing APPELLANT'S BRIEF upon the following:

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